

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANE MCCRARY,

Defendant and Appellant.

B282424

(Los Angeles County  
Super. Ct. No. BA438697)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

---

Shane McCrary, convicted of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1)), contends that the evidence was insufficient to support his conviction, and that the trial court abused its discretion when it denied his motion for new trial without an evidentiary hearing. We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

McCrary was charged with assaulting Jeffrey Saputra with a deadly weapon and battery (§ 242) on Natalie Meza. He was alleged to have suffered four prior convictions within the meaning of section 667.5, subdivision (b).

Saputra testified at trial that on August 4, 2015, he heard someone trying to enter his apartment. He opened the door, saw McCrary walking away, and asked McCrary if he could help him. McCrary first said he worked in the apartment building, then claimed to be making a delivery. After McCrary provided a nonexistent apartment number for the delivery, Saputra told him to leave and said, “Don’t come back, or you’re going to get fucked.” McCrary charged at Saputra. Concerned for his safety, Saputra began to call 911.

McCrary continued to run toward Saputra, saying, “Stop calling the cops. I’m going to stab you.” McCrary was pointing a screwdriver toward Saputra. When he was within arm’s reach of Saputra, McCrary thrust the screwdriver with a stabbing motion toward Saputra’s chest and torso. Saputra jumped back, thinking McCrary was going to stab him.

McCrary knocked the phone out of Saputra’s hand, and the phone broke into three pieces. McCrary waved the screwdriver from left to right as he bent to pick up two parts of the phone.

---

<sup>1</sup> All further statutory references are to the Penal Code.

Saputra picked up the final piece of the phone and asked McCrary for the others. McCrary wanted help getting out of the building, and Saputra agreed to help McCrary if he returned his phone.

McCrary asked if there was a staircase; Saputra lied and said no because McCrary would have been able to escape easily if he had taken the stairs. Hoping the security guard would be in the lobby, Saputra told McCrary to take the elevator. McCrary told Saputra to come with him; and Saputra, focused on retrieving his phone, complied. McCrary was no longer holding the screwdriver. Saputra told McCrary that they would act like friends so McCrary could exit the building unchallenged.

When they reached the lobby, McCrary gave Saputra one piece of the phone. Saputra saw Meza at her desk, and he told her that McCrary had stolen his phone. Meza called 911. McCrary gave Saputra the final piece of the phone. Meza attempted to prevent McCrary from leaving; McCrary punched her in the face. He tried to leave through the apartment building's rear door, but people from the martial arts studio next door to the apartment building slowed his escape.

The police captured McCrary as he tried to flee. One of the people from the martial arts studio picked up McCrary's screwdriver just outside the apartment building's back door, and Saputra gave it to the police.

Saputra's neighbor, Nicholas Lew, testified that he was home at the time of the incident. He heard someone kicking his door, and then he saw a man's face through the frosted glass panel next to the door. Lew heard Saputra say "Hey," and then he heard additional voices and a scuffle. Lew could see Saputra through the apartment door peephole. Lew opened the door and

stepped into the hallway. A man<sup>2</sup> at the end of the hallway was pointing a screwdriver at them. Saputra pleaded with the man to return his phone. The man said he would give the phone back if Saputra helped him get out of the building. Saputra told Lew he was all right and entered the elevator with the man. Lew returned to his apartment.

Another neighbor, Anthony Rosales, testified that McCrary knocked at his door and said he was from housekeeping. Rosales, suspicious because the building had no housekeeping service, told McCrary to go away. Shortly afterwards, Rosales heard a loud scuffle in the hallway. He heard two people, one of whom said, “Give me back my cell phone.” Rosales called 911 when he heard yelling and fighting. He did not open his door.

Security guard Meza testified that she saw Saputra and another man arguing in the lobby. Saputra promised not to call the police if the other man returned his phone, but the man refused. Saputra told her that the man had tried to enter his apartment and had taken his phone. Meza attempted to detain the man, but he walked away. He hit her on the jaw when she tried to block his exit. Clients of the martial arts studio cornered the man, but he broke free and fled.

Meza saw a screwdriver on the ground among items that had spilled from McCrary’s bag. Meza never saw any video from the surveillance cameras in the lobby, and she did not know of anyone who had viewed the footage. The footage was stored on a hard drive that recorded over prior recordings after 12 days. A police officer had requested the footage; she had referred the

---

<sup>2</sup> Lew could not positively identify the man he saw as McCrary.

officer to her supervisor. There were no surveillance cameras on the floor where Saputra lived.

Officer Jeshua Munoz testified that he and his partner, Christopher Bolan, responded to a report of a robbery at the apartment building. Saputra directed them toward McCrary, and they arrested him as he tried to flee. The only evidence retrieved at the scene was a screwdriver that had been picked up by a person from the martial arts studio. At the scene Munoz spoke with Meza, who told him that surveillance video would be available the following day. Although Munoz noted this in his report, he did not pick up the footage. He was unaware of anyone from his office retrieving it or viewing it. Munoz never viewed any surveillance footage. There was no recording from the dashboard camera system in the patrol car because the system malfunctioned.

At the conclusion of the prosecution's presentation of evidence, McCrary's counsel expressed surprise that Bolan was not present, stating that it had been her "impression that the officers were going to be called."

The court advised counsel that Bolan had an infectious disease and was unable to come to court. The court said, "The bottom line, though, is that everyone is responsible for him or herself before us. I wouldn't expect the People to make a case that we should wait for a witness that they expected you to bring in if they don't have them under subpoena."

Defense counsel advised the court that the sole witness she had subpoenaed, the head of security for the apartment complex, was unavailable. She informed the court that she believed the witness would testify that the police officer watched the video at the scene, and then, despite being told that the footage would

only be available for 12 days, failed to obtain the video. The court advised McCrary's counsel that such evidence "doesn't really go to the issue of—not directly anyway—to the issue of whether your client is guilty or not. It goes to the issue of whether there was in all respects a very thorough and punctilious investigation of the crime."

Defense counsel conceded that the police had no duty to obtain a copy of the surveillance footage. The court observed that the footage had been equally available to the defense prior to its destruction, and McCrary's attorney advised the court that the public defender's office had filed an investigation request asking for the video during the 12-day period before it was destroyed. Noting that a subpoena to the actual holder of the footage would have been a better idea, the court said, "You're requesting at that point something the People didn't have. So I mean it's not really helpful." The court asked defense counsel for her proposed argument concerning the footage, and she answered that the police would have secured a copy of the video if it had been inculpatory. The court found this argument speculative and premised on the assumption that the police had viewed the tape. McCrary's counsel stated that her client believed that the video was not preserved because it was exculpatory.

Although the court continued the case until the head of security was available, McCrary ultimately chose not to call him to testify. Defense counsel advised the court that she had spoken with the witness and made the tactical decision that presenting his testimony would be "a complete waste of time."

The jury convicted McCrary of assault with a deadly weapon. McCrary, who elected to represent himself after the verdict, filed a motion for new trial. The trial court denied the

motion. McCrary admitted one prior conviction for the purposes of section 667.5, subdivision (b), and the court sentenced him to a total of four years in state prison. McCrary appeals.

## DISCUSSION

### I. Deadly Weapon

A “deadly weapon” under section 245, subdivision (a)(1) is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.” [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.] [Citation.]” (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.)

McCrary argues that the evidence concerning the screwdriver was insufficient to support his conviction because no reasonable jury could have found beyond a reasonable doubt that he used the screwdriver in such a manner as to be capable of producing, and likely to produce, death or great bodily injury. ““When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”

[Citation.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.]” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

The verdict was supported by substantial evidence: McCrary told Saputra he was going to stab him; while within arm’s reach of Saputra, he made thrusting, stabbing motions with the screwdriver toward Saputra’s chest and torso; and Saputra jumped back in fear that he would be stabbed. On these facts, a reasonable jury could well find that the screwdriver, as employed by McCrary, was capable of producing, and likely to produce, death or great bodily injury.

McCrary observes that Saputra was not touched or injured by the screwdriver, but physical touching with the deadly weapon is not required. “One may commit an assault without making actual physical contact with the person of the victim; because [section 245] focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. [Citation.]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1036, fn. 9.) He also notes that Saputra testified that McCrary used a flat-head screwdriver, and he did not clearly recognize the Phillips screwdriver introduced at trial, but he does not demonstrate, and we do not detect, any difference in the screwdriver’s capacity for great bodily injury or death based on the shape of its point.

McCrary next argues that Saputra was “obviously unafraid of being in the elevator alone with appellant who had his pack



and belongings still with him.” At this point, however, the assault was complete, and McCrary had put away the screwdriver; the fact that Saputra subsequently went into the elevator with McCrary in pursuit of parts of his phone does not establish that the screwdriver had not been employed in a manner that was capable of producing, and likely to produce, death or great bodily harm.

McCrary relies on *In re Brandon T.* (2011) 191 Cal.App.4th 1491, *People v. Beasley* (2003) 105 Cal.App.4th 1078, and *In re B.M.* (2018) 6 Cal.5th 528, but these cases are distinguishable. In *In re Brandon T.*, the court held that as it had been used, a rounded butter knife was not capable of producing death or great bodily injury: It failed to break the victim’s skin, and it broke under pressure that was insufficient to cause great bodily injury. (*Brandon T.*, at pp. 1496-1497.) In *Beasley*, the court determined that no evidence had been presented that would have permitted the jury to determine whether the broomstick used by the defendant was capable of causing, and likely to cause, great bodily injuries or death. Neither the broomstick nor a photograph of it was introduced into evidence; there was no evidence of its composition, weight, and rigidity; and the victim did not describe the broomstick or the degree of force the defendant had used. (*Beasley*, at pp. 1087-1088.) And in *In re B.M.*, the court found that there was insufficient evidence that a butter knife was a deadly weapon where it was not sharp; it was used only on the victim’s legs while they were covered with a blanket; and it was used with pressure insufficient to pierce the blanket, much less cause serious bodily injury. (*B.M.*, at pp. 536-538.) Here, in contrast, McCrary thrust a screwdriver at Saputra’s chest and torso with a stabbing motion, supporting the

determination that he used a weapon capable of producing, and likely to produce, great bodily harm or death.

## **II. Motion for New Trial**

McCrary argues that the trial court abused its discretion when it denied his motion for new trial without permitting him to examine Bolan to establish whether the police or prosecution's failure to obtain and preserve the surveillance camera video was in bad faith. Due process requires law enforcement to preserve evidence that "might be expected to play a significant role in the suspect's defense"; that is, evidence that (1) possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 (*Trombetta*); *People v. Alexander* (2010) 49 Cal.4th 846, 878.) When the lost evidence is potentially useful, the government's failure to preserve it constitutes a violation of due process only if the defendant can show the failure was in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (*Youngblood*); *People v. DePriest* (2007) 42 Cal.4th 1, 42.)

There was no due process violation here because there was no evidence from which it could be concluded that the evidence in question was either exculpatory or potentially useful with respect to the charge of assault with a deadly weapon. The security camera footage came from cameras in the lobby, and there were no cameras on the floor where Saputra lived. Therefore, no security video footage could have captured the altercation outside Saputra's apartment. The cameras could only have recorded the conflict in the lobby with Meza (for which McCrary was acquitted of battery) and McCrary's departure. McCrary did not present

any evidence that the surveillance video of the lobby exculpated him or was relevant to the charge of assault with a deadly weapon, nor are we able to envision how footage of the later events in the lobby could be exculpatory or pertinent to that charge. As the evidence in question could not have been exculpatory as required by *Trombetta, supra*, 467 U.S. at pages 488 through 489, or potentially useful to McCrary under *Youngblood, supra*, 488 U.S. at page 58, on the assault with a deadly weapon charge, the trial court did not abuse its discretion in declining to permit McCrary to examine Bolan about the failure to preserve the lobby camera footage.<sup>3</sup>

### DISPOSITION

The judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.

---

<sup>3</sup> To the extent that McCrary argues that his counsel provided ineffective assistance with respect to this evidence, the record on appeal is insufficient to permit us to make any determinations in this regard. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to “why counsel acted or failed to act in the manner challenged . . . is more appropriately decided in a habeas corpus proceeding”]; *People v. Jones* (2003) 29 Cal.4th 1229, 1263 [issues requiring review of matters outside the record are better raised on habeas corpus rather than on direct appeal].)